IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1686

LODGES 743 AND 1746, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO BRIEFS IN OPPOSITION

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1. Board counsel argue that despite the court's rejection of the Board's waiver finding and holding, the "underlying rationale" of its decision is "the same" inasmuch as the court "considered the same factors" (Bd. Opp. p. 11). That statement is palpably incorrect and the error destroys the assumption, said to distinguish *Chenery,* that on remand, the Board "would reach the same result as the court" (*id.,* pp. 11-12).

Of the six factors relied on by the Board (five numbered plus the apparent state of the law, *id.*, pp. 7-8), the court did not "consider" the first three at all. The statement (*id.* p. 9) that "[t]he court noted * * * that

the Union had the benefit of experienced counsel * * *" (emphasis added), which makes it appear that the court considered factor (2), is erroneous; in striking contrast to the Board, the court "considered" that "*the Company* had the advice of experienced labor counsel" (57a, emphasis added), a factor relevant, as the court saw it, to the Company's good faith and hence to retroactivity, but obviously not to waiver *by the Union*. In addition, the court considered the other factors (56a-57a), only as bearing on the Company's good faith, which the Board and the courts reject as a defense even in true retroactive overruling situations. See *Laidlaw, American Machinery* and *Erie Resistor*, Pet. pp. 29-30, 36.[1] Board counsel ignore yet another factor on which the court, but not the Board, relied—the passage of time since the inception of this litigation (57a). That factor, plainly irrelevant to waiver, was deemed relevant on retroactivity by the Court of Appeals. The Board surely would not have "considered" delay, since, in accord with this Court's decisions, it has refused to impose the consequences of delay on the victims of discrimination. See Pet. n. 22 at p. 33, last par.

Most important of all, however, the court did not merely fail to rely on factor (3)—consideration for waiver of strikers' rights—on which the Board placed greatest stress; it expressly rejected it, holding that inasmuch as the Company had led the Union to understand that the complements would be restored to normal size by Labor Day, the Union could not be deemed

[1] "Good faith and detrimental reliance have been rejected as an affirmative defense when balancing the equities in awarding damages in * * * labor law." *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1377, n. 37 (5 Cir., 1974).

to have contemplated or agreed to the consequences of prolonged complement depression (Pet. p. 4; Pet. in No. 75-1729, pp. 24-25).[2] In the court's view, on the circumstances which developed, there was *no understanding* and therefore *no agreement* to terminate reinstatement rights.

Thus, in contrast to the Board, the court did *not*, as Board counsel erroneously imply (Opp. p. 11), predicate its rationale or its result upon "the settlement agreement." Accordingly, it is temerarious for appellate counsel to predict that, deprived of the crucial "consideration" underpinning of its reasoning, the Board, on remand, "would reach the same result as the court" (*id.*, p. 12). On the contrary, if the Board were to follow its precedents and policies, it would reach the opposite result, see pp. 7-9, *infra*.

2. The attempt to distinguish "factually" cases rejecting the "unsettled state of the law" defense (Opp. p. 12) is absurd. Judicial power to refuse to enforce a statutory liability because the state of the law was unsettled does not turn on "facts."[3]

[2] Although the findings of the court below that the Company represented that the complements would be restored to pre-strike size by about Labor Day are a key predicate of our petitions, the briefs in opposition never refer to them. See Bd. Opp. p. 4, n. 3, p. 5, n. 5, and p. 11; Co. Opp. pp. 8-9, 12-13. Thus it is *they* which ignore the crucial fact "accepted by the courts below" (Co. Opp. p. 13).

[3] Moreover, the proffered distinctions (Bd. Opp. pp. 12-13, n. 14), are puerile. Protection of unreplaced economic strikers' reinstatement rights is as essential to effectuate this Act's central policy of "solicitude for the right to strike" (*Erie Resistor*, 373 U.S. at 233-234, Pet. in No. 75-1729, pp. 31-32), as removal of racial barriers is to Title VII's anti-discrimination policy. If striker reinstatement rights are curtailed or infringed by agreement, the

Speculation that the court below did not "intend to disturb the settled distinction" (Opp. p. 12), overlooks that it actually obliterated the distinction by equating

right to engage in future concerted activities does not "*remain free.*" *See Mastro Plastics Corp.* v. *Labor Board*, 350 U.S. 270, 280 (1956). Because unreplaced strikers' reinstatement rights are personal, they are not subject to limitation or curtailment "through collective bargaining," regardless of the parties' "good faith." (Pet. p. 8, n. 6).

Assertion that "some of the registered strikers [wholly unidentified and unquantified] were not recalled under the agreement because their jobs were filled by permanent replacements" (Bd. Opp. p. 5), is a diversionary irrelevancy. Inasmuch as the Company admittedly had not "eliminated or filled with permanent replacements *all* positions vacated by the strikers," (*Newspaper Production Company* v. *NLRB*, 503 F.2d 821, 829-830 (5 Cir., 1974)), none lost employee status and all were entitled to *Fleetwood* rights. Cf. *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. at 379, holding that where only 21 replacements were hired during the strike, compared to 55 strikers, none of the six striker applicants had been permanently replaced during the strike. In any event, even if some strikers had been "permanently replaced," others admittedly were not, and, they, incontestibly, present the issue.

The theory (Bd. Opp. n. 14, p. 13, first full par.) that unsettled state of the law should be considered a defense in this case because the settlement agreement "represented a good faith effort by the parties to define strikers' reinstatement rights through collective bargaining rather than through litigation" crumbles before the court's finding that the subject of strikers' rights in a complement still temporarily depressed four and a half months after the end of the strike was simply not within the contemplation of the parties (15a-17a, 54a-55a).

There is neither a finding nor any evidence to support the *ipse dixit* (Bd. Opp. n. 14, p. 13, second par.), that the Union "was clearly seeking to enhance the reinstatement rights of strikers * * * under the law as it existed at that time." On the contrary, having won the strike, the Company dictated the terms of the settlement agreement; the Company unilaterally imposed the four and a half month limitation because that "was as long as we wanted to continue the preferred hiring list" (A. 1161). Here, just as in *Fleetwood*, petitioners merely "bowed to the [Company's] decision." 389 U.S. at 381, n. 8.

acknowledged absence of precedent on point (53a), with adjudged nonexistence of a duty.[4]

No manipulation or "combination" (Bd. Opp. p. 14) of *Fleetwood* and *Laidlaw* can obscure the statements in the opinion below that "[t]o our knowledge, there was in 1960 no Board or court decision dealing with precisely those circumstances", and "*Atlas* can be read as applying only when an economic striker's job has been permanently eliminated by an employer." (53a). The court below thereby acknowledged that *Atlas* is reasonably susceptible to a different interpretation than the one it preferred. Yet, it treated its preferred interpretation as the "governing standard" (*RWDSU*, 466 F.2d at 389), and, on that premise, treated *Fleetwood* as "overruling." (Bd. Opp. p. 14). The question thus is the validity of so equating unsettled law with settled law. That question manifestly does *not* "turn[] on an interpretation of past Board decisions" (Opp. p. 14), or on interpretation of *Fleetwood* or *Laidlaw*, alone or in "combination": it is a question of whether two possible reasonable interpretations can be made to equal one. It is a question which can arise under any statutory scheme, as the *Hanover* case which arose under the anti-trust laws and the *United States Steel* litigation which arises under the Civil Rights Act of 1964 illustrate. See Pet. pp. 18-23. Thus, its potential impact cannot be limited, as Board

[4] "*Laidlaw* and *Fleetwood* imposed duties on employers which had not theretofore existed." (56a). The equation means, of course, that debatable statutory rights and duties do not exist before authoritative adjudication; on that theory, retroactivity is barred in every arguable case of first impression. It is difficult to imagine a proposition better calculated to invite gambling with the statutory rights of others and to multiply litigation on the merits and on the issue of retroactivity as well.

counsel would have it, to the retroactivity of *Fleetwood* rights—which is simply the occasion which gave rise to the unprecedented retroactivity holding in this case.[5]

[5] Attempts to support the Board's and the court's interpretation' of the law as it stood in 1960 require excising language from this Court's decision in *Fleetwood*, and transforming what the Board considered a mere happenstance in *Atlas* into rationale for the holding. Thus, the Company argues that "*Fleetwood* did not distinguish between strikers who were permanently replaced and those whose former jobs had been temporarily discontinued due to strike-related business losses" (Co. Opp. p. 19) and asserts that *Fleetwood* did not focus "on why the job was unavailable." (*id.*, p. 20). Cf. Bd. Opp. n. 8, p. 6. That ignores not only this Court's identification of available defenses as "permanent replacement" and job elimination (389 U.S. at 379), but its explanation of why temporary complement depression cannot qualify as a defense (*id.* at 381): "Frequently a strike affects the level of production and the number of jobs. It is entirely normal for striking employees to apply for reinstatement immediately after the end of the strike and before full production is resumed."

There is neither a finding nor any evidence in *Atlas* to support the Company's assertions that (Co. Opp. pp. 20-21) the striker's job was "temporarily discontinued" or that the loss of business was "strike-related." The court below, Board counsel and everyone else has always considered the job elimination in *Atlas* to have been permanent. Thus ,the Company's theory (never stated before in this litigation) why *Atlas* supported its action is unique; this simply confirms how easily a party can, when charged with a violation, conjure up a theory for an "unsettled state of the law" defense. The vacancy in *Atlas* resulted from an unpredictable event, injury (Bd. Opp., n. 17, p. 15), not from intended post-strike complement reflation, as did the vacancies in *Fleetwood*, 389 U.S. at 379, and this case.

Finally, the relevance of the Board's historic recognition of the distinction between "temporary and permanent complement depression" in striker eligibility to vote cases is not diminished, as Board counsel contend (n. 17, p. 15, last par.), by the fact that the Board equated the statutory touchstone—a right to reinstatement—with reasonable expectancy of reemployment, which, in turn, depended in depressed complement cases on whether the depression was temporary or permanent. "[T]he mutual expectation of reemployment justified the Board in treating the employee relationship

The question presented therefore does have "significance beyond this particular case" and clearly does "warrant review of this Court" (*id.*), not only for that reason but also because the answer given by the court below conflicts with all prior decisions on the subject including that of this Court in *Hanover* and that of the D.C. Circuit in *RWDSU*, on which the briefs in opposition mistakenly rely.

3. The Board's Opposition argues (n. 15, p. 13), that the Company's presumed reliance on the settlement agreement as dispositive of strikers' statutory rights supplies the missing element of "good faith reliance" upon "the prior state of the law." But assertion that the Company relied on the *agreement* (*id.*), is a tacit admission that it did not rely on Board or court *decisions validating its conduct.* And the Company's attempt to enlarge the Court of Appeals' carefully circumscribed statement (which is all the record will support) that during the settlement negotiations the Company "had the advice of experienced labor counsel" (57a) into a finding that counsel advised that unrecalled strikers for whom jobs were temporarily unavailable at the end of the strike lost their employee status (Opp. p. 23), is patently untenable, first because no Company witness ever so testified and second, because the Company's actions in this litigation demonstrate that its counsel was well aware that the only strikers whose status was lost were those who had been permanently replaced or whose jobs were permanently abolished (Pet. 28-29, 44-45).

of the laid off men as continuing * * *. It was therefore proper to allow them to participate in the election. *Marlin-Rockwell Corp.* v. *NLRB, supra,* 116 F.2d at 588." *NLRB* v. *Jesse Jones Sausage Co.*, 309 F.2d 664, 665-666 (4 Cir., 1962).

The court below did not find that the Company had relied on the agreement. That had been the Board's theory, citing, as Board counsel note here, "*Wooster Division of Borg-Warner Corp.*, 121 NLRB 1492, 1495" (Bd. Opp. n. 6, p. 8). But Board counsel had conceded in the court below that there was no precedent in 1960 which afforded any rational basis for the assumption that the law allowed strikers' statutory rights to be limited or curtailed by private agreement. (See Pet. n. 8, p. 10) [6] The occasion for that concession was the Union's demonstration that the *Borg-Warner* case had held that the strikers' statutory rights were not subject to waiver, and had been cited as a non-waivability precedent in the Board's brief to this Court in *Fleetwood,* see n. 8, p. 10 *infra* (last case cited in quote). In fact, as of 1960 (indeed until its decision in this case) *every* Board and court decision had held that statutory reinstatement rights are not vulnerable—no cases look to the contrary.[7] As we have seen, n. 6,

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[6] Board counsel there said:

> "Of course, even if *Borg-Warner* were indistinguishable on its facts, the instant case and *Laher Spring* would still be the first occasions in which the Board confronted the impact of *Fleetwood* on recall agreements. Accordingly, the existence or absence of this Board precedent—which the Board mentioned in a footnote—is hardly as significant as the Union seeks to suggest." (Bd. Br. in Court of Appeals, n. 11 cont., p. 21)

Yet, having prevailed on a different theory in the court below they now regard *Borg-Warner* to be sufficiently "significant" to cite to this Court without acknowledging their prior concession.

[7] *Stewart Die Casting Corporation,* 14 NLRB 872, 895, enf'd 114 F.2d 849 (7 Cir. 1940); "nor are the rights of the striking employees • • • under the Act affected in any manner by reason of

supra, until today Board counsel attempted to distinguish the precedents on the ground that they did not

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• • • [the union's] • • • acquiescence in the terms and the conditions of the strike settlement." *Poultrymen's Service Corp.*, 41 NLRB 444, 462, enf'd, 138 F.2d 204 (3 Cir. 1943); "[n]or do we find merit in the respondent's contention that the settlement agreement • • • relieved the respondent of any duty it might have to reinstate the strikers." *Mathieson Chemical Corporation,* 114 NLRB 486, 499, enf'd, 232 F.2d 158 (4 Cir. 1956), aff'd 352 U.S. 1020 (1957): "The law 'frown[s] upon any agreement permitting an *employer* to discriminate against employees who *participate* in a strike." (Emphasis by the Board). *Fitzgerald Mills Corporation,* 133 NLRB 877, aff'd, 313 F.2d 260 (2 Cir. 1963), cert. denied, 375 U.S. 834 (1963): "It is well settled that a union cannot waive the reinstatement rights of strikers • • •." *Laclede Metal Products Co.*, 144 NLRB 15 (1963): "We agree • • • that the strike settlement agreement • • • is no defense. The nine employees who were unlawfully laid off because of the agreement had a statutory right to strike at the time they did so. We find that it was illegal for the Union and the Respondent to agree to any discrimination against them for exercising this right, regardless of whether such agreement resulted from the Respondent's insistence or was wholly voluntary on the Union's part. See *Erie Resistor Corporation,* 132 NLRB 621, 631, footnote 31."

This long line of authority was summarized in *Tanner Motor Livery, Ltd.*, 160 NLRB 1669, 1670-1671, n. 3 (1966): "Moreover, assuming the validity of the Respondent's contention that its strike settlement and contract offers were linked together, Respondent's imposition of its strike settlement offer to require that strikers return to work as new employees, was a clearly unlawful condition. *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221. Indeed, had Respondent signed a contract providing, *inter alia,* that returning strikers were new employees, we could in an appropriate proceeding order such a requirement deleted from the contract. *Laclede Metal Products Co.*, 144 NLRB 15; *Great Lakes Carbon Corp.* v. *NLRB,* 360 F.2d 19 (C.A. 4), enfg., 152 NLRB 98[8]. See also *Erie Resistor, supra; Arlington Asphalt Co.,* 136 NLRB 742, enf'd. 318 F.2d 550 (C.A. 4)."

deal explicitly with *Fleetwood* or *Laidlaw* rights. That is an admission that the Company could not have "relied" in "good faith" on precedents holding *Fleetwood* or *Laidlaw* rights vulnerable to limitation or cut off in a strike settlement agreement.

4. In asserting that the decision below is alternatively supportable on the theory that *Fleetwood* rights are waivable (Opp. 11, n. 12), Board counsel again ignore the court's finding that the prospect of complement depression "for the duration of the Agreement was never seriously discussed during negotiations" and that *Fleetwood* rights, therefore, "could not have [been] knowingly waived" (54a-55a). That patently invulnerable finding aside, tender of the waivability issue *increases* the importance of granting certiorari.

Board counsel to the contrary notwithstanding, both *Fleetwood* and *Laidlaw did* "concern [ ] a strike settlement agreement" (Opp. p. 7). In *Fleetwood,* it was the Board's position throughout that economic strikers' reinstatement rights are not vulnerable to waiver by the collective bargaining agent.[8] This Court

[8] In its Brief to the Ninth Circuit, the Board relied on the Third Circuit's decision in *Erie Resistor,* quoted in our Petition herein at p. 30, and went on to say

> "* * * the collective bargaining representative's acquiescence in an infringement of employees rights to strike can [not] make lawful the discrimination against employees * * *"

and

> "* * * union and employer * * * [cannot enter] into a cooperative arrangement to limit individual statutory rights * * *." Brief for the National Labor Relations Board (9 Cir.), No. 20,511, pp. 10-11.

In its Brief to this Court, the Board responded as follows to the Company's argument that the Union had waived the strikers' reinstatement rights by the settlement agreement:

> "When the issue of reinstatement arose, the Union already had lost the strike and had been forced to accept the Company's pre-strike contract offer (R. 47-48). The Union received nothing in return for the non-preferential plan; it was not even reduced to writing. Moreover, *even if the Union had agreed to a nonpreferential plan, this would not have constituted an effective waiver of the employees' statutory right to reinstatement. Electrical Workers Local 613* v. *National Labor Relations Board,* 328 F.2d 723, 726-727 (C.A. 3); *National Labor Relations Board* v. *E.A. Laboratories, Inc.,* 188 F.2d 885, 887 (C.A. 2), certiorari denied, 342 U.S. 871; *Laclede Metal Products Co.,* 144 NLRB 15, 16; *Wooster Div. of Borg-Warner Corp.,* 121 NLRB 1492, 1495; * * *." (Emphasis added.) Brief for the National Labor Relations Board, *NLRB* v. *Fleetwood Trailer Co., Inc.* No. 49, Oct. Term, 1967, pp .20-21, n. 11.

expressly reserved that issue (389 U.S. at 375, n. 8). On remand, the Board rested on its original brief, and the Ninth Circuit enforced the Board's order, *per curiam.* 67 LRRM 2768.

In *NLRB* v. *Laidlaw Corporation,* 507 F.2d 1381, 1382 (1974) (*Laidlaw II*), the Seventh Circuit rejected the Board's assumption of waivability,[9] holding that "the company had no right to bargain with the union using these employee rights for the ante."

Nor is there anything "unique" (Opp. p. 12), about destroying reinstatement rights by limiting their duration. The identical device was used in *Laher, supra.* And in *Brooks Research & Mfg. Co.,* 202 NLRB 634, 636 (1973), the Board squarely "rejected the [employer's] contention that a time limit should be placed on the reinstatement rights of economic strikers" on the grounds that "such a time limit is contrary to the principles enunciated in *Fleetwood* and *Laidlaw* [and]

[9] In its brief to the Seventh Circuit in that case, p. 8, the Board had argued that "the Board may, in its discretion, give effect to so-called strike settlement agreements in certain circumstances," citing its decision in the instant case and *Laher Spring,* 192 NLRB 464, 465-466 (1971).

the alleged burden upon an employer is neither onerous nor severe." Accord: *American Machinery Corp.* v. *N.L.R.B.,* 424 F.2d 1321, 1327 (5 Cir., 1970). *Laidlaw* v. *N.L.R.B.,* 414 F.2d 99, 105, n. 2 (7 Cir., 1969)

5. Board counsels' assumption (Opp. p. 15), that the burden of proof is the same in rebutting a *prima facie* case of anti-union motivation as in establishing, *ab initio,* a "legitimate and substantial business justification" for failing to restore the complements to pre-strike size as soon as possible (Pet. p. 35; Pet. in No. 75-1729, pp. 33-35) is unwarranted, as the Petitions demonstrate. As shown in the companion petition, the Company did not even undertake to offer an explanation of why it chose not to populate the machine shop to full capacity immediately after the strike, as it did immediately after the settlement agreement. The court below considered such an explanation unnecessary to meet the *prima facie* case; but it *is* indispensible to establish the requisite affirmative defense.

6. The Company argues that its employment policy must be considered non-discriminatory because "only" 1562 strikers were denied reinstatement (Co. Opp. 5), while Board counsel argue that the size of the record excuses non-compliance with *Chenery* on the post-1960 discrimination issue (Bd. Opp. n. 18, p. 16). The short answer is that 1562 discriminatees is *more than* the Board found to have been discriminated against *in all its other cases combined* in fiscal year 1971.[10] The magnitude of this case and the number and importance of the issues presumably accounts for

[10] In fiscal 1971 the Board ordered "employers to reinstate 1,066 employees with or without back pay [and] to give back pay without reinstatement to 56 employees." *Thirty Sixth Ann. Rep. NLRB* (Gov't Print. Off. 1972), p. 18.

the fact that the Board took two years—from July, 1969 to July, 1971, to decide it. The same factors required more, not less, explanation than customary of the Board's analysis and disposition of each contested issue, particularly novel ones, or ones on which the Board's approach was unprecedented or in conflict with other authority.

Board's counsel's assertion that "no extended discussion was required in rejecting the contention that former strikers are *per se* more qualified as new job applicants than are non-strikers" (Opp. p. 16) is refuted by the fact that that "contention" underlies every other Board case on point, including *Laidlaw*, *Laher* and *Fire Alert,* and even *NLRB* v. *Jesse Jones Sausage Co.*, 309 F.2d 664, 667 (C.A. 4), which Board counsel cite in another context. (Opp. n. 17, p. 15). There the court held that: "[giving] jobs in its packing room to seven newly hired persons without offering similar employment to the eight who voted for the union, *despite their seniority as experienced workers in the packing department* * * * [proved] that the Company was motivated to slam the door in their faces * * * because of their affiliation with and support of the union." (Emphasis added.)

Actually, Board counsel misstate the "contention" which is *not* that former satisfactory employees are necessarily more qualified than new applicants, but, rather, that the Board may and does presume on the basis of its experience (cf. *Republic Aviation Corporation* v. *NLRB,* 324 U.S. 793, 804 (1945) that, absent explanation, non-discriminatorily motivated employers prefer tried and tested former employees to newcomers. Thus, the Board held in the *Jones* case that ignoring

11 out of 16 laid off workers, "in favor of hiring 7 new employees" required "adequate explanation." 131 NLRB 370, 371 (1961). In this case, the Company not only offered *no* explanation for preferring newcomers; it offered *no* explanation for its even more blatantly discriminatory action in *advertising* for outsiders when qualified former strikers were available (Pet. pp. 37, 38).

Thus, an explanation of the Board's deviation from its own and judicial precedents was imperative, see *Labor Board* v. *Metropolitan Insurance Co.*, 380 U.S. 438, 444-446 (1964). Board counsels' attempted distinction of *Laidlaw* and *Laher* compounds the error; for, not only is it contrary to the teaching of *Metropolitan Insurance* (and countless other cases) that it is the agency's explanation rather than that of counsel which is required, but counsels' purported distinction is factually inaccurate: the presence of "specific evidence of anti-union motivation" (Bd. Opp. n. 19, p. 16), was explicitly treated in *Laidlaw* and *Laher* as *an alternative ground for decision.*

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